



# Indiana Confidential

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Access to Confidential Records  
Kept By or For the Indiana  
Judiciary  
September 14, 2006



# Probation Records Scenario

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- Probation revocation is based on failure to report.
- Probationer requests copy of officer's casefile notes.
- Chief Probation Officer tells probationer notes are confidential and probationer cannot have copy.
- Probationer asks you to overrule Chief.



# Probation Records Confidentiality

## Judicial Conference Probation Records Standard

### IV. A. 1.4 Summary:

- (1) Probation information made confidential by another statute or rule (e.g., federal alcohol and drug program regulations) can be released only to the extent and in the manner provided by that particular statute or rule.
- (2) Information in probation records not confidential under 1. above is confidential, subject to the discretion of the probation supervising judge to permit access upon request.



# Probation Records Request

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- Probationer tells you he wants the notes to argue there was confusion about reporting times.
- Officer's notes indicate reporting schedule change was sent to probationer at address on file.
- How do you rule on probationer's request?



# Discovery Request Filed

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- Revocation counsel files Trial Rule 34 request for casefile notes.
- After talking with supervising judge, chief probation officer files motion for protective order in the revocation proceeding.
- Motion asserts materials are confidential and supervising judge does not approve release.
- Motion requests T.R. 34 request be denied.



# Rule Without Hearing?

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- Motion for protective order has chief probation officer's affidavit attached avowing records are probation records and that supervising judge does not approve their release.
- Can you rely on just the affidavit without in-person testimony from the chief?



# Rule on Discovery Request

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- Assume discovery applies to revocations.
- You are the revocation judge.
- How do you rule?



# Change of Judge?

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- If you consulted with chief probation officer about not handing over notes on probationer's request, should you disqualify as revocation judge?





# General Issues

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- When can non-discovery requests by public for access be denied?
- What is the denial procedure? Who decides to deny? How is decision communicated?
- Can discovery be used to get records? What does the language of the particular confidentiality provision say about discovery?



# General Issues (Continued)

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- Distinction: non-discoverable “privileged” versus discoverable “confidential” materials
- Different person makes decision when discovery is used – the litigation judge, not the record keeper judge
- Must confidentiality be invoked by record keeper (motion for protective order or quash) or can it be invoked *sua sponte* by litigation judge?



# General Issues (More)

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- When a motion for protective order or to quash is filed, can an affidavit be used by moving party in lieu of live testimony?
- If litigation judge also is record keeper and was involved in denying access as record keeper, must litigation judge disqualify when protection or quashing is sought?



# "Confidential" Defined

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- Records "confidential" under Indiana law are not subject to the Access to Public Records statutes' public right to inspect and copy records. See I.C. 5-14-3-3.
- Judicial record is "accessible to the public" unless "excluded from public access and . . . confidential" under list of exceptions to access in the Rule. Administrative Rule 9.



# Sources of “Confidential” Status

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- Indiana statute or regulation
- Indiana supreme court rule
- Federal statute or regulation



# Confidential Is Not Privileged

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- “Statutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts.” *Pearson v. Miller*, 211 F.3d 57 (3<sup>rd</sup> Cir. 2000).



# Privileged = Not Discoverable

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- “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action.” Trial Rule 26(B).



# Federal Rule on Discovery of Confidential Material

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- “[I]t is well established that [federal] courts are to avoid construing confidentiality provisions in statutes as barring disclosure for discovery purposes unless the statute clearly and unambiguously requires such suppression.” *Chaplaincy of Full Gospel Churches v. England*, 234 F.R.D. 7, 11-12 (D.D.C. 2006).





# Indiana Confidentiality and Discovery Policies?

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- Indiana has not yet established policies for determining when confidentiality provisions allow discovery.
- A few Indiana confidentiality statutes address discovery expressly, which may help arguments that “silent” provisions were not intended to prohibit discovery.



# Raising Confidentiality

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- “Documents which are merely confidential ‘are not absolutely protected from discovery,’” and “[t]o restrict discovery of such documents, the responding party may move for a protective order.” *National Union Fire Ins. Co., P.A. v. Midland Bancor*, 159 F.R.D. 562, 568-69 (D. Kan. 1994).



# Motions to Quash

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- Subpoenas for confidential materials may be challenged by the motion to quash. Trial Rule 45.



# Protective Order and Quashing Remedies

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- Prevent any disclosure.
- Limit disclosure pending litigation and post-litigation.
- Redaction.
- In-camera inspections.



# Sealing Judicial Records

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- An “open” record can be “sealed.” Indiana Administrative Rule 9(H). See also IC 5-14-3-5.5 (access to public records sealing procedure requiring notice and a hearing).
- Does sealing of a record preclude its discovery? Admin. R. 9(G)(1)(c) (“excluded from public access by specific court order” is “excluded from public access and confidential”).



## *Sua Sponte* Actions?

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- May a court issue a protective order, quash a subpoena, or seal a record *sua sponte*? Indiana law does not expressly permit, nor does it preclude.



# Administrative Rule 9(I)

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- Allows access to confidential material.
- Verified petition, public notice, hearing:
  - Extraordinary circumstances present, public interest served by access, no significant risk of substantial harm, and
  - no prejudice to ongoing proceedings, or confidentiality provisions listed in Subsection (G) should not be applied.



# Alcohol and Drug Program Scenario – Request to Inspect

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- Defendant in probation revocation (in Circuit Court, and for a new offense) asks to see his court alcohol and drug program files.
- A & D program is “free-standing” (run by the Superior Court, and not part of probation department).
- Defendant wants files to demonstrate cooperation in program, to argue for continuation on probation.





# A & D Request (Continued)

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- You are the judge who supervises the program, and the director asks you for advice.
- Federal regulations allow the request?
- Director wants to resist based on Judicial Conference Alcohol and Drug Program Rule 24(a)(10), because there are notes in the files director does not want probationer to see.
- What is your advice to the director? (See page 3 of memo in binder.)



# A & D Scenario - Subpoena

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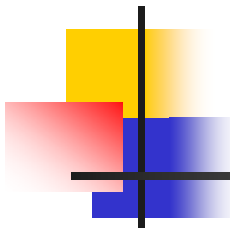
- Assume director denied access.
- Now revocation counsel files subpoena duces tecum in the revocation to require director to provide copies of file.
- No consent form is attached to the subpoena, and none on file with program.
- What do you advise director? (See page 6 of memo in binder.)



# A & D Scenario - Hearing

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- Since no consent, 42 CFR Part II requires a hearing before subpoena can be obeyed.
- Program must be notified and allowed to appear.
- Court is to find “good cause” for release:
  - Can’t get info other ways.
  - Public interest and need for disclosure outweigh potential harm to patient or program.



# A & D Scenario – Hearing (Continued)

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- Release order for subpoena should be limited to what is needed by applicant.
- If “confidential communications” sought, additional findings required:
  - Disclosure needed to protect against existing threat to life or of serious bodily injury, or
  - Necessary in investigation of bad crime, or
  - Patient has already offered evidence about the confidential communications.



## A & D Scenario – Quash?

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- Program director has county attorney file a motion to quash in the revocation proceeding in Circuit Court.
- Hearing scheduled and held in Circuit Court. Probationer repeats his needs. Program director testifies breach of confidentiality will be bad for program.



## A & D Scenario (Continued)

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- You are the Circuit Court judge – how do you rule?
- Do you release non-"confidential communications" portions of file?
- What about "confidential communications?"
- Federal requirements aside, how do you rule on the Judicial Conference confidentiality standard claim?



## A & D Program – Divorce

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- Probationer is getting divorced, in a court at the other end of the state.
- Wife files a T.R. 34 request to see the A & D files (to show that Probationer has been uncooperative in program and should not have joint custody).
- There is no consent form from probationer for Wife's access.



# A & D Program – Divorce (Cont'd) – Protective Order

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- You are the program supervising judge. Do you advise the program director to resist the discovery? Why?
- Motion for protective order is filed. Director has attached affidavit asserting confidentiality outweighs marginal probative value of files on custody, and asks for ruling without hearing.
- Now you get to be the divorce judge – do you require a hearing? What is your ruling on the merits?





# Presentence Report

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- IC 35-38-1-13 provides that presentence reports “shall be kept confidential.”
- Victim of defendant’s crime requests a copy of the presentence report, citing the victim’s rights amendment and stating she wants the report as evidence for a civil action.



# Presentence (Cont'd)

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- IC 35-38-1-13 - Presentence report:  
may not be made available to any person or public or private agency other than:
  - (1) The convicted person and his counsel;
  - (2) The prosecuting attorney;
  - (3) A probation department;
  - (4) The community corrections program . . . and
  - (5) The Indiana criminal justice institute . . .except where specifically required or permitted by statute or upon specific authorization by the court and the convicted person.



## Presentence (Cont'd)

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- Does the presentence statute allow reports to be obtained through discovery?
- Should probation department seek a protective order?
- How would you rule on a motion for protective order?



# Delinquency Case Records

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- Key prosecution witness will testify he saw defendant and his juvenile accomplice outside burglary scene with prybars in their hands. Police found burglary premises doors pried open.
- Witness has already testified in accomplice's delinquency hearing.
- Defendant asks juvenile court for copy of transcript of witness's testimony - ?



# Delinquency (Cont'd)

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- IC 31-39-2-12 authorizes juvenile court to grant access to delinquency records if the juvenile is to testify as a witness, but is silent about witnesses in delinquency proceeding.
- IC 31-39-1-2: "All juvenile court records subject to this chapter are confidential and are available only in accordance with IC 31-39-2," which does not authorize access here.
- Do the juvenile statutes preclude D's request?



# When Discovery Not Authorized, Admin. Rule 9(I)

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- As noted earlier, Administrative Rule 9(I) allows access to confidential materials when statutes and other rules preclude access.
- Rule requires a verified petition to the record-holding court, and a showing at a public hearing of extraordinary circumstances, public interest served, no significant harm in release, etc. (See Slide 23.)
- Does this situation merit Rule 9(I) relief?



# Delinquency – the Constitution versus Confidentiality Policy

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- Defendant asserts his Sixth Amendment Confrontation right requires disclosure of the delinquency testimony, and cites:
- *Davis v. Alaska*, 415 U.S. 308 (Sixth Amendment right is paramount to state confidentiality interest in protecting juvenile's identity, when defendant wants to disclose delinquency probation status, in violation of state statute, of witness against him.
- Does *Davis* apply in this case?



# Conclusions:

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- “Confidential” does not necessarily rule out discovery.
- Examine text of statute or rule to see if discovery is authorized.
- Check for special discovery procedures.
- Apply discretion to balance interests.
- Constitution may override discovery prohibitions.





# Resources

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- ❑ Indiana Public Access Counselor –advice on Access to Public Records statutes:

<http://www.in.gov/pac/>

- ❑ Public Access to Court Records Handbook –

<http://www.in.gov/judiciary/admin/pubs/access.html>